IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 566 OF 1991.

1. Sau Shashikala Bhimrao Mali
   r/o. Ashta, Tal . Walva
   District : Sangli

2. Amar Bhimrao Mali
   r/o Ashta, Tal. Walva
   District : Sangli .. Appellants.

V/s.

Shri Bhimrao Ganapati Mali .. Respondents.

Mrs. S.S.Gokhale for the Appellants .

Mr.S.S.Savaji holding for Mr.P.B.Shah, Advocate for the Respondent.

CORAM : S.R. SATHE, J.

DATED : 29TH JULY, 2004.

ORAL JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Additional District Judge, Sangli, in Regular Civil Appeal 496 of 1986, whereby the appeal was allowed and decree for maintenance passed in favour of the the plaintiffs 1 and 2 was set aside, the original plaintiffs have preferred this second appeal. (For the sake of convenience hereafter the parties shall be referred to as

appellant and respondents.)

2. Brief facts giving rise to this appeal are as under :

. The appellant no.1 got married with respondent in the year 1967 when she was in fact minor. After marriage appellant no.1 and respondent started residing together at Kharsingi. In the year 1968 the respondent joined military service. Whenever he used to be on leave, he used to go to village Kharsingi and appellant no.1 and respondent used to stay together. Till the year 1985 the appellant no.,1 could not conceive a child. It is the case of the appellant that as a result of the same the respondent was dis-satisfied and on that ground he used to ill-treat her. In the year 1985 the respondent even gave notice in the news paper and made wild allegations about the chastity of the appellant. Apprehending danger to her life she started residing separately and filed Regular Civil Suit No.13 of 1986 on 8.1.1986 and claimed maintenance for herself. During the pendency of the said suit on 8.3.1986 appellant no.1 gave birth to a male child i.e. appellant no.2. She further sought amendment in the plaint and also claimed maintenance for the minor child.

. The respondent/husband filed his written statement and resisted the suit claim and contended that the appellant was never ill-treated. He further contended that the appellant was not in fact living properly and she was having illicit relations with one person by name Arun Yeshwant Mutkatti. According to him he had gone to village Ashta in the year 1984 and thereafter again he had gone only on 20.08.1985. However, at that time he found that the behaviour of the appellant was not proper and she was keeping detached relations. Naturally, he made query about the same with the mother and the brother of the appellant and he was informed that appellant was pregnant and she was having relations with one Arun Yeshwant Mutkatti. The respondent therefore asked appellant no.1 to get herself examined from doctor. Apprehending the danger in the same, the appellant no.1 ran away from the house. The respondent, therefore, lodged complaint with the police and ultimately appellantwas brought before the Court by police and thereafter she was sent to remand home. Even at that time the appellant no.1 did not express her desire to reside and co-habit with the respondent. Then on 8.3.1986 appellant no.1 gave birth to a child. The respondent contended that appellant no.2 is not begotten from him. Besides this the appellant no.1 had also started residing with said Arun Mutkatti. Hence on all these grounds the

respondent/husband prayed for dismissal of the suit.

. On the pleadings of the parties the learned trial judge framed issues. After considering evidence adduced by both the parties, the learned trial judge came to the conclusion that the respondent husband failed to prove that he had no access to appellant no.1 at the relevant time. He, therefore, directed the respondent/husband to pay maintenance of Rupees 100/- per month to appellant no.l and Rs.50/- to appellant no.2.

3. Being aggrieved by the above order the respondent preferred Regular Civil Appeal No.496 of 1989 in the Court of the Additional District Judge, Sangli. The Appellate Court found that the finding recorded by the learned trial judge with regard to non access was not correct. He came to the conclusion that the respondent/husband had in fact adduced sufficient evidence to show that he had no access to appellant at the relevant time and consequently the presumption under section 112 of Indian Evidence Act was rebutted. Considering this aspect he allowed the appeal and set aside the decree passed by the learned trial judge.

4. Being aggrieved by the said order the appellant

filed the present second appeal . In this second appeal before me Smt. Gokhale, learned Advocate for the appellant has urged only two points. Firstly, she submitted that the finding of the Appellate Court that the appellant husband had established his case of non access is incorrect and secondly, the finding that presumption under section 112 of the Indian Evidence Act was rebutted is also wrong. She also submitted that even if it is assumed for the sake of argument that the respondent has proved that the child , namely appellant no.2 is not begotten from him, still then the appellant wife is entitled for maintenance. For this proposition she has placed reliance on a case Gulab Jagdusa Kakwane vs. Kamal Gulab Kakwane reported in AIR 1985, Bombay 88, wherein it was held that husband obtaining decree of divorce on the ground of adultery - does not disentitle wife to maintenance. As against this, Mr. Savji learned advocate for the respondent supported the judgment and order passed by the appeal court.

5. At the outset it must be mentioned that this being second appeal the scope is very limited. This court cannot exercise its jurisdiction unless there is substantial question of law. In the instant case, it is an admitted fact that the marriage between appellant no.1 and respondent took place in the year 1967 and thereafter for a

period of about 18 years the appellant could not conceive a child and then she gave birth to a child on 8.3.1986. It is also admitted that right from the year 1968 the respondent was serving in military and he used to visit Ashta and stay there with appellant only when he used to get leave i.e. usually twice in a year. It is the contention of the respondent that he had been to village Ashta in October 1984 and thereafter again on 20.8.1985. However, it is the case of the appellant that respondent had come to village Ashta in the month of June 1984, when sister in law of the appellant had expired and she had informed about the same to the respondent by sending a telegram. As the child was born on 8.3.1986 and the doctor had opined that it was a fully matured baby, the period of gestation would be between 15.5.1985 to 15.6.1985. So, main point for consideration was whether during that period the respondent no.1 had come to village Ashta and he had stayed alongwith appellant. Thus , according to respondent as he had no access to appellant at the relevant time, the appellant would not be entitled to get benefit of the presumption under section 112 of the Indian Evidence Act.

6. Thus, the only substantial question of law involved in this second appeal is whether presumption under section 112 of Indian Evidence Act was rebutted by the

respondent.

7. It is needless to say that the burden was obviously on the respondent to establish by cogent and convincing evidence that he had no access to appellant at the material time i.e. during the period 15.5.1985 to 15.6.1985. Even the appellant has also alleged that in between the said period the respondent had come only once and that was at the time when her sister in law had expired. If we peruse the judgment of the appellate court it appears that the appellate court had taken into consideration the letters sent by the appellant no.1 to respondent. The said letters are at exhibit 41 and exhibit 47 to 49. From these letters and in particular from the letter at exhibit 41, which bears postal stamps dated of 6.7.1985 the learned appellate judge has held that the story of the appellant that respondent no.1 visited Ashta after the death of her sister in law and that was in June 1985 is not correct. From the perusal of the above mentioned letters exhibit 41 and exhibit 47 to 49 we find that the respondent must not have visited Ashta in the period May 85 to June 85. The expression used by the appellant no doubt indicates that she was waiting for her husband and was insisting that her husband should visit Ashta early. At the same time there is nothing in this

letter from which it can be inferred that the respondent had visited Ashta either in the month of May or June 1985. The appellate court therefore rightly observed that merely because the respondent did not examine any person from the military department to prove the leave record, it cannot be said that he has failed to discharge his burden, particularly when even from the pleadings of the parties and the evidence on record it was clear that the respondent had not visited Ashta during the period 15.5.1985 to 15.6.1985. It is nobody's case that the delivery of the appellant no.1 was premature. On the contrary, the medical certificate which is produced at exhibit 23 shows that the doctor had opined that the child was a fully matured baby. So, under such circumstances it is very clear that the findings recorded by the appellate court regarding non access is legal and correct. Naturally, as the respondent has proved that at the relevant time i.e. during the period of conception there was no access to him, presumption under section 112 of Indian Evidence Act stands rebutted. It is well settled that in the case where from the given set of circumstances, two inferences are possible, one drawn by the lower appellate court and the other contrary to it, the inference drawn by the appellate court is binding on the High Court in second appeal. The High Court cannot substitute its opinion for the opinion of

the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court or the conclusions were based upon inadmissible evidence or arrived at without evidence. It has been so held in the case of Kondiba Dagdu Kadam vs. Savitribai Sopan Gujar & Others reported in AIR 1999 S.C.2213. As already mentioned by me, in the instant case by no stretch of imagination it can be said that the conclusions arrived by the appellate court are perverse or that the same are being arrived at without there being any material on record.

7. It was argued on behalf of the appellant that even if it is held that the presumption under section 112 of Indian Evidence Act stands rebutted, in the instant case, still then, maintenance can be granted to wife and for that proposition reliance was placed on the authority mentioned above(AIR 1985 Bom 88). On careful reading of the said authority it appears that the said authority has not laid down the ratio that in each and every case when the divorce is granted, the wife under all circumstances is entitled to claim maintenance. On the contrary, the Division Bench of this court has specifically observed in

the said ruling that the court has ample discretion to grant or refuse maintenance and the extent to which the same can be granted depending on the facts and circumstances of each case. Taking into consideration the peculiar facts of this case, namely the appellant no.2 is begotten not from the respondent and appellant had run away from the house of the respondent and also did not get herself examined from the doctor as suggested by the respondent and further had even refused to stay with the respondent, she is not entitle for maintenance. Incidently, it must also be noted here that admittedly in the year 1995 the respondent had filed Hindu Marriage Petition No.128 of 1990 in the Court of Joint Civil Judge, Sr. Division, Sangli, on the ground that the appellant wife is living in adultery and the same was allowed. At that time also the question regarding permanent alimony was considered but the court refused to grant any alimony. Admittedly, after said decision the wife i.e. appellant no.1 in this case has not preferred any appeal.

8 In view of the above, there is no substance in this appeal. The appeal is dismissed.

. In the circumstances, parties to bear their own costs.

(S.R.Sathe, J.)

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